Office-Supreme Court, U.S.
FILED
FEB 23 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

WORTHINGTON CORPORATION, a Delaware corporation,
Petitioner,
vs.
LEASE MANAGEMENT, INC., a Michigan corporation,
Respondent.

No. 997

OBJECTION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI and MOTION TO AFFIRM THE JUDGMENT WITH BRIEF IN SUPPORT THEREOF

BYRON P. GALLAGHER,
Commercial Block,
Mt. Pleasant, Michigan,
and
CHOLETTE, PERKINS & BUCHANAN,
(EDWARD D. WELLS, *Of Counsel*),
Tenth Floor, Peoples Building,
Grand Rapids, Michigan 49502
Attorneys for Respondent.

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS, MICHIGAN 49502 — PHONE GL 8-5326

INDEX

	Page
Index of Authorities Cited	iii
Objection to Petition for Writ of Certiorari	1-2
Brief in Support of Objection—	
(a) Statement	3-6
(b) Argument	6-16
(c) Conclusion	17
(d) Relief	17

INDEX OF AUTHORITIES CITED

	Page
Ackerberg v. Muskegon Osteopathic Hospital, 366 Mich. 596, 115 N.W. (2) 290	8
Barron v. City of Detroit, 348 Mich. 213, 82 N.W. (2) 45	11
Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W. (2) 627	12
Davis v. Terrien, 364 Mich. 82, 110 N.W. (2) 754	8
Detroit & Milwaukee R.R. Co. v. Van Steinburg, 17 Mich. 99, 2 N.W. 38	9
Grand Trunk R.R. Co. v. Ives, 144 U.S. 408, 12 S. Ct. 679, 36 L. Ed. 485	11
Grodi v. Mierow, 244 Mich. 511, 221 N.W. 637	7
Humenik v. Sternberg, 371 Mich. 667, 124 N.W. (2) 778	8
Kaminski v. Grand Trunk Western R. Co., 347 Mich. 417, 79 N.W. (2) 899	11
Morgan v. Engles, 372 Mich. 514, 127 N.W. (2) 382	8
Sparks v. Luplow, 372 Mich. 198, 125 N.W. (2) 304	12
Wood v. Chalmers Motor Co., 207 Mich. 556, 175 N.W. 449	11
Young v. Lee, 310 Mich. 42, 16 N.W. (2) 659	12
Rule 19, U. S. Supreme Court Rules	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

WORTHINGTON CORPORATION, a Delaware corporation,
Petitioner,

vs.

LEASE MANAGEMENT, INC., a Michigan corporation,
Respondent.

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

Lease Management, Inc., by its attorneys, objects to the plaintiff's petition for Writ of Certiorari and moves to affirm the judgment of the United States Court of Appeals for the Sixth Circuit upon the following grounds:

1. It is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument.

2. That said petition does not meet the requirements of Rule 19 of Rules of the Supreme Court of the United States.

3. There is no basis for exercising "supervisory powers" or for reminding the United States Court of Appeals for the Sixth Circuit that "gross errors in dealing with the record will not be tolerated."

4. The opinion and judgment of the United States Court of Appeals for the Sixth Circuit is an entirely correct and proper one.

BYRON P. GALLAGHER,
Commercial Block,
Mt. Pleasant, Michigan,
and

CHOLETTE, PERKINS & BUCHANAN,

By EDWARD D. WELLS,
Tenth Floor, Peoples Building,
Grand Rapids, Michigan 49502

Attorneys for Respondent.

BRIEF IN SUPPORT OF OBJECTION AND MOTION

STATEMENT

Plaintiff Worthington is engaged in the business of manufacturing and installing electric generators (40a). In June 1958 plaintiff entered into a contract with Wolverine Electric for the sale and installation by plaintiff of a generator (93a). At the time of the explosion the contract had not been completed (93a).

At the time of the explosion, the engine had been operating at the Wolverine Electric plant for about four months and work was still being done on the engine (41a). The architect, in conjunction with the plaintiff Worthington, designed the layout to this new engine (67a, 68a). The layout was so designed that the air intake to this new engine was outdoors, near the ground and was located about one and one-half to three feet (51a) from the regulator on the natural gas line which ran to this engine (67a, 68a, 51a). There was a low wall about three and one-half feet or so running alongside the intake (69a). The plaintiff's brief on appeal below, at page 5 sets forth a most helpful and enlightening sketch of the situation.

The gas line to this new engine was of three-inch size; the line came up from under the ground and then there was the regulator above ground (72a). This regulator regulated the gas which went to this new engine (44a). The function of the regulator was to cut the pressure from 50 to 60 pounds down to 20 to 25 pounds (44a). The regulator could be removed from the gas line by taking off the bolts on the flanges on each end of the regulator (45a). When the regulator was removed, it left an open space in the natural gas line of about twelve inches (48a).

Plaintiff's witness, Mr. Kaufman, testified that he is employed by plaintiff and is consulting engineer for the plaintiff Worthington and that he had a hand in designing the engine (76a). It was a typical generating plant (79a). The engine was intended to work either on oil or natural gas (77a). Mr. Kaufman explained in detail the operation of the engine. He explained that air comes into

the engine from the outside (78a). The air was drawn or sucked in through the outside air intake by a turbo-supercharger in the engine. Mr. Kaufman further testified that the volume of the gas which would be coming out of the twelve inch space in the three-inch line would be approximately 7,400 cubic feet per minute (82a). And 10,000 cubic feet per minute of outside air would be drawn in through the air intake (82a). He further testified, with the air intake vent system of the engine located about three feet from the ten to twelve inch opening in the gas line, that the gas flowing from the line would be drawn into the air filter of the engine (79a, 81a). That the valves in the engine are all open for about one-third of one revolution, and that the air would come through the cylinders and pass into the exhaust pipe of the engine where there would be a flame; this would ignite the gas, and there would be an explosion (81a).

On the date of the accident, Mr. Wood, the chief operator and boss of the Vestaburg plant, owned by Wolverine Electric (38a-39a) testified that the No. 6 engine which had been operating on natural gas began to lose its load (41a); he changed the engine over to diesel oil (41a) and went down to talk to Mr. Lewis, the employee of the defendant (42a). Mr. Lewis came back from the Edmore field with Mr. Wood to the Wolverine plant (43a). Mr. Wood further testified "We decided we would have to take the regulator out" (43a). This regulator was then removed from the line (45a). He testified that he and Mr. Lewis did that (45a), one on each side of the regulator (45a). The regulator was then taken into the shop, cleaned (46a) and reassembled by Mr. Wood and Mr. Lewis (46a).

There was no gas coming out of the opening where the regulator had been taken out because the gas line was turned off at the valve at the gas house located about fifty or sixty feet away (47a). Mr. Wood testified that they then decided to blow out the line (47a). Mr. Lewis "kind of suggested that we blow out that line" (58a). "I thought it would be all right" (58a).

Mr. Wood further testified that he went to the gas house (50a) and while Mr. Lewis stood about six feet from the air intake (51a) Mr. Wood opened the valve and closed

it; a cloud of dirt came out of the line (52a). He opened and closed it again and still some dirt came out, but not as much, and just an instant after than an explosion occurred (52a). The noise could be heard for miles (53a). It blew the gas house down, and Mr. Wood crawled out from the wreckage. Mr. Lewis was killed by the explosion (58a).

The natural gas came directly from the field where both oil and gas were produced (105a). The gas was a by-product of the oil (105a). Whatever kind of gas that was in the well was the kind of gas they got (111a, 112a). It was untreated (112a).

Mr. Wood testified that during the four months this new engine was operating, they had trouble off and on with the gas line (65a). He had run a one-inch line from the three-inch pipe, and ran the one-inch line under and by the air intake; there was a valve on this one-inch line (72a). He would take care of the three-inch gas line by blowing out the one-inch line. It was the same line (65a, 72a, 55a). He would do it by opening and closing the valve; on these previous occasions he had done it on his own as boss of the Wolverine Electric plant (65a).

Mr. Keane, the general manager of Wolverine Electric (92a) testified he knew Mr. Lewis and that on at least three or four occasions he saw Mr. Lewis servicing, that is taking the dirt out of the regulator of the gas line (96a).

Mr. Wood testified that he might have said while the design of the plant was going on, namely the placing of the regulator within a foot and a half of the air intake, that he "told the engineers that was a very foolish way to design it" (67a-68a).

The United States Court of Appeals for the Sixth Circuit reversed this case not only on the basis that contributory negligence was a question of fact for the jury but also reversed for other additional reasons as well, namely for the reason that Wolverine Electric should be made a third-party defendant, for possible error in permitting testimony equally within the knowledge of the deceased, and for failure to instruct that Mr. Lewis, defendant's employee and being deceased, was presumed to be free from negligence (Appendix on this Petition for Writ of Certiorari, pp. 1a-12a). Plaintiff filed a motion for rehearing with

the United States Court of Appeals on one ground only, namely that the Court erred in holding contributory negligence a question of fact for the jury. The plaintiff's motion for rehearing was denied.

ARGUMENT

The pertinent portion of Rule 19 of the Rules of the United States Supreme Court provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion indicate the character of reasons which will be considered:
>
> * * *
>
> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

At pages 8 and 9 of the plaintiff's Petition for Writ of Certiorari, it is stated:

> "We recognize and agree with the proposition that ordinarily the Court will not grant certiorari to 'review evidence, and discuss specific facts.' United States v. Johnston, 268 U.S. 220, 227 (1925). This policy is appropriately based on a due regard for the demands

> of the Court and orderly disposition of litigation. But at the same time, we recognize that this Court has on occasion taken appropriate opportunities to remind the lower federal courts that gross errors in dealing with the record will not be tolerated. E. g., Stringfellow v. Atlantic Coast Line R. Co., 290 U.S. 322 (1933)."

We respectfully submit there is no gross error; in fact there is no error at all. The opinion of the Court of Appeals which involves an accident occurring in Michigan was written by a former Supreme Court Justice of Michigan. As stated in the concurring opinion of Judge Phillips, it is a "well reasoned opinion."

The plaintiff seeks to deprive the defendant of a jury trial on the question of contributory negligence. The opinion of the Court of Appeals in the instant case properly states: (5a)

> "Indeed, exceptions to jury consideration are rare. In the much cited Van Steinburg case, Justice Cooley stated the basic Michigan rule as to them. 'The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility.' Detroit & Milwaukee Railroad Co. v. Van Steinburg, 17 Mich. 99, 120 (1868). While this was said about a verdict directed against a plaintiff, it also applies to an instruction against a defendant on the issue of contributory negligence. See Hileman v. Northwest Engineering Co., supra. And, of course, on an instructed verdict on this issue, we review the evidence applicable to it from the point of view favorable to the party (here the defendant) who was deprived of a jury decision. Price v. Firestone Tire and Rubber Company, 321 F. 2d 725 (C.A. 6, 1963); see, also, Ware v. Nelson, 351 Mich. 390 (1958)."

In *Grodi v. Mierow*, 244 Mich. 511, the Supreme Court of Michigan said:

> "The only question is whether plaintiff was guilty of negligence as a matter of law. The testimony and

inferences most favorable to plaintiff must be accepted."

See also *Davis v. Terrien,* 364 Mich. 82; *Humenik v. Sternberg,* 371 Mich. 667; *Morgan v. Engles,* 372 Mich. 514.

In *Ackerberg v. Muskegon Osteopathic Hospital,* 366 Mich. 596, the plaintiff entered the hospital at the emergency platform, became a little nauseated and dizzy while in the emergency room with his daughter and wife, felt the need of fresh air, went out on the emergency platform and fell off because of his dizzy condition.

Plaintiff contended defendant hospital was negligent in failing to construct a guard railing or chain around the platform, which was used for patients being transported to and from the hospital. The platform was 2 to 3 feet above the ground level. The trial court held defendant was free from negligence as a matter of law. In reversing the Court said:

"The most satisfactory statement of the rule for such a case, and the one easiest to comprehend and apply, is that given by the supreme court in Grand Trunk R. Co. v. Ives, 144 U.S. 408, 12 S. Ct. 679, 26 L. ed. (485) arising out of a controversy in this jurisdiction, where it is stated (p. 417):

" 'When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.'

"In Detroit & Milwaukee R. Co. v. Van Steinburg, 17 Mich. 99, Justice Cooley said (p. 120):

" 'The case, however, must be a very clear one which could justify the court in taking upon itself this responsibility. For, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him

out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that, if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury.' "

"Justice Talbot Smith, writing in McKinney v. Yelavich, 352 Mich. 687, 692 said:

" 'Only under the most extreme circumstances, those in fact, where reasonable minds could not differ upon the facts, or the inferences to be drawn therefrom, can the case be taken from the jury. If honest differences of opinion between men of average intelligence might exist, the issue should not be resolved by the court alone.' "

In the leading case of *Detroit & Milwaukee R.R. Co., v. Van Steinburg,* 17 Mich. 99, the Michigan Supreme Court said:

"As a general rule, it can not be doubted that the question of negligence is a question of fact and not of law.

* * * *

" 'The question as to the existence of negligence, or a want of ordinary care, is one of a complex character. The inquiry not only as to its existence, but whether it contributed with negligence on the part of another to produce a particular effect, is much more complicated.

As to both, they present, from their very nature, a question, not of law, but of fact, depending on the peculiar circumstances of each case, which circumstances are only evidential of the principal fact — that of negligence or its effects — and are to be compared and weighed by the jury, the tribunal whose province it is to find facts, not by any artificial rules, but by the ordinary principles of reasoning; and such principal fact must be found by them, before the court can take cognizance of it, and pronounce upon its legal effect.'

"It is a mistake, therefore, to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence can not be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they can not be decided upon by the court. Negligence can not be conclusively established by a state of facts upon which fair-minded men may well differ. In Ireland v. Oswego R.R. Co., 13 N.Y., 533, Judge Johnson, speaking upon this subject, says: 'The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as matter of law. On the contrary, it is almost always to be deduced as an inference of fact, from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their force and weight considered. In such case the inference can not be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout. Presumptions of fact, from their very nature, are not strictly objects of legal science, like presumptions of

law. That the care exercised by the plaintiff at the time of the injury, and the negligence of the defendant, were both questions for the jury to determine, can not admit of any doubt' " (122, 123).

In *Grand Trunk R.R. Co. v. Ives,* 144 U.S. 408, 12 S. Ct. 679, 36 L. Ed. 485, the Supreme Court of the United States said:

"As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other. This rule is sustained by the Michigan authorities (Mynning v. Detroit, L. & N. R. Co., 64 Mich. 93; Underhill v. Chicago & G. T. R. Co., 81 Mich. 43; Baker v. Flint & P. M. R. Co., 68 Mich. 90; Engel v. Smith, 82 Mich. 1); and its correctness is apparent from an examination and analysis of the generally accepted definitions of contributory negligence, as laid down by the courts and by text-writers" (493).

See also *Barron v. City of Detroit,* 348 Mich. 213; *Wood v. Chalmers Motor Co.,* 207 Mich. 556; *Kaminski v. Grand Trunk Western R. Co.,* 347 Mich. 417, 420.

In *Sparks v. Luplow,* 372 Mich. 198 in applying the case to a question whether the plaintiff was guilty of contributory negligence as a matter of law, the Court said:

> "The test used is whether from the facts in the light most favorable to plaintiff, reasonable men could honestly reach a different conclusion. If the answer to this is "yes," the question is for the jury. Anderson v. Jean Deming Motor Sales Inc., 371 Mich. 223."

Comstock v. General Motors Corp., 358 Mich. 163, supports the proposition that the question of proximate cause is for a jury.

In the instant case, we have involved a natural gas line running to an electric generator; a dangerous agency requires the use of a higher degree of care. *Young v. Lee,* 310 Mich. 42, 47.

The opinion of the Court of Appeals states (Appendix to plaintiff's petition p. 5a):

> "Both parties conceded at trial (and before us) that the generator — built to consume gas in great quantities — fell into the 'dangerous instrumentality' category."

At page 5 of its Petition for Writ of Certiorari, plaintiff says:

> "The dispositive holding below was that the trial court improperly withheld the issue of contributory negligence from the jury. This decision was based on the Court of Appeals' finding that:
>
> " 'A careful review of this record convinces us that there was testimony from which the jury could have found or inferred 1) that plaintiff Worthington was responsible for the design and layout of the generator which located its air intake near the removable regulator, 2) that plaintiff knew, or should have known, of the possibility that the regulator might be removed in order to blow out the line while the plant was operating, and 3) that such location of the air intake of

an acknowledged dangerous instrumentality was negligence which contributed as a proximate cause of this explosion. (App., infra, p. 6a)

"The short answer to this statement is that there is absolutely no basis in the record upon which the Sixth Circuit could possibly find support for proposition '1,' while '2' is the product of a clear mistake. Hence '3' loses its validity as a conclusion of law since petitioner could not be negligent under any theory without knowledge of a foreseeable danger and responsibility for location of the vent in light of that knowledge."

In the instant case, plaintiff Worthington manufactured the engine and helped design the layout so that the air intake was located within one and one-half feet of a removable regulator in the gas line. In addition, at the time of the accident, plaintiff Worthington was still working on the engine, had been so working and installing the machine for four months prior to the explosion. We thus not only have a question of negligent design, we have a situation where the plaintiff itself installed the layout, and where, during a period of four months, plaintiff Worthington actually saw or could have seen how the situation was laid out.

The record we submit discloses the following facts or inferences:

1. This generator, using natural gas, being a dangerous substance, a high degree of care was owing.
2. Plaintiff knew this air intake to the generator gulped or sucked in large quantities of air, namely 10,000 cubic feet a minute.
3. The air intake was placed near to the ground rather than being raised some distance up into the open air above.
4. The gas line with removable regulator was located and placed approximately one and one-half feet from the air intake.

5. Plaintiff knew that if gas were sucked into the air intake, that it would be ignited by the engine and would explode.

6. The gas regulator in the gas line was placed above the ground, easily accessible and so attached to the gas line that it was easily removable.

7. The jury could infer that removing a regulator and blowing out a gas line is not an uncommon practice.

Mr. Keane, general manager of Wolverine Electric, testified:

"Q. (By Mr. Zelle): Mr. Keane, did you know Mr. Lester Lewis?

A. I did.

Q. Had you ever seen him at the plant site of the Wolverine Electric plant at Vestaburg, Michigan, prior to the date of this explosion?

A. I had.

Q. On how many occasions?

A. It would be very difficult to say at this time. At lease three or four occasions.

Q. What was he doing on the occasions you saw him?

A. Servicing —"

* * *

"Q. (By Mr. Zelle): What did you see him do physically?

A. Taking the dirt out of the regulator.

Q. Out of the gas line?

A. That is right.

Q. Had you seen him there on week days as opposed to weekends?

A. Yes, because I am very seldom in the plant on weekends.

Q. On these occasions when you would see Mr. Lewis there, was it during working hours?

A. Oh, yes" (96a).

Mr. Wood testified that during the four months during which the engine had been running, they had trouble with the gas line. They were able to take care of it by blowing it out. He testified:

"Q. Had you had any trouble with the gas line in those four months?

A. Yes, we had trouble off and on.

Q. Were you able to take care of it?

A. Well, by blowing out a line.

Q. You blew out the line on these other occasions, did you not?

A. It was nothing, only just a small line.

Q. Yes. Now, there isn't any real difference in blowing out a one-inch line or in blowing out a three-inch line in what you do, is there?

A. Well, it was a little different location.

Q. Yes, but all you do is open a valve and blow the gas through it to clear the dirt out?

A. Yes.

Q. That is what you had done previously on other lines that were clogged, right?

A. It was the same line" (65a).

Mr. Wood further testified:

"Q. (By Mr. Zelle): Will you tell how you blow that one-inch line out?

THE COURT: You may answer the question.

A. The three-inch line comes up out of the ground and it is buried underground about three feet; and this one-inch line takes off under the ground about three feet right beside the pipe that comes up through where the regulator was put on.

Well, there was a three-inch line, or the one-inch line, and the valve is up there.

Q. (By Mr. Zelle): An inch line and a valve where?

A. On the inch line. We ran a line under, through the air intake and blew it out beyond the air intake.

Q. Okay, that is what I wanted to clarify. When that one-inch line was blown out by you, where did the gas go in relation to the air intake?

A. It went beyond the air intake.

Q. Was that true when Mr. Lewis and you blew out the three-inch line?

A. No" (72a).

And on the date of the accident, Mr. Wood and Mr. Lewis in fact took the regulator off and then blew out the line. This was a gas line running directly from an oil and gas field with the gas therefrom being untreated and containing some dirt and other debris.

The evidence we submit raises a strong inference that it is not uncommon to blow gas lines out by removing the gas regulator. Whether plaintiff actually knew that the three-inch line itself had been blown out is not the important factor. Plaintiff Worthington designed and installed this layout of a dangerous agency. They should know of the possibilities that gas lines may be blown out. It is for the jury to say whether they used due care in the installation and design of this gas line and air intake.

8. The dangerous character of this air intake was concealed and misleading; there was no warning sign of danger.

9. Mr. Wood, who was long familiar with power plants, opined that the design or the layout was "very foolish."

After review of this testimony, when taken most favorably to defendant, together with all inferences to be drawn in favor of defendant, certainly there is no reason whatsoever for this Honorable Court as requested by plaintiff to take the lower Federal Court to task or to supervise it for gross or exceptional error. In fact, the ruling of the Court of Appeals we submit is entirely correct and proper.

CONCLUSION

The plaintiff herein, in effect, seeks a directed verdict that it is free from contributory negligence as a matter of law. A directed verdict will be given only in the most exceptional case. Only where all reasonable men could not differ upon the facts or inferences and the result to be drawn therefrom can the case be taken from the jury. In the instant case, on the other hand, it appears "very foolish" for the plaintiff to have taken part in the design and to have laid out or installed the engine with the air intake located within one and one-half feet of an easily removable regulator on a natural gas line which it is conceded is a dangerous instrumentality. Not only was it designed in this way, the plaintiff laid out and installed or set up the situation; and at the time of the explosion, plaintiff had been at the scene for over four months.

Defendant respectfully submits that the opinion and ruling of United States Court of Appeals for the Sixth Circuit is entirely proper. We further submit there is no reasonable basis for granting certiorari in this case.

RELIEF

Wherefore defendant respectfully requests this Honorable Court to deny the plaintiff's Petition for Writ of Certiorari. All of which is respectfully submitted.

Byron P. Gallagher,
Commercial Block,
Mt. Pleasant, Michigan,

and

Cholette, Perkins & Buchanan,

By Edward D. Wells,
Tenth Floor, Peoples Building,
Grand Rapids, Michigan 49502

Attorneys for Respondent.